In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,
Petitioner,

vs.

PAUL CUMMINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF TRANS WORLD AIRLINES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PARKER SEAL COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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Trans World Airlines, Inc. ("TWA") moves for leave to file the attached brief *amicus curiae* in support of Parker Seal Company's ("Parker Seal") petition for a writ

of certiorari to the United States Court of Appeals for the Sixth Circuit.[1] Pursuant to Rule 42 of this Court, consent to the filing of the brief was requested of the parties. Counsel for Parker Seal has consented. Counsel for respondent stated that he would neither consent nor refuse to consent but would leave the matter to the discretion of the Court.

INTEREST OF THE AMICUS CURIAE

TWA is a corporation engaged in the transportation by air of persons, property and mail in interstate and foreign commerce. It has some 37,000 employees of which approximately 53% are covered by contracts with unions, including some 15,000 employees covered under TWA's collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

As a carrier by air, TWA is subject to Title II of the Railway Labor Act, as amended, which gives employees the right to organize and bargain collectively through representatives of their own choosing and imposes upon air carriers and their employees the duty to use every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle by negotiation all disputes arising between them.

TWA's interest in this case is direct because it is party to *Hardison* v. *Trans World Airlines, Inc., et al.*, 375 F. Supp. 877 (W.D. Mo. 1974), *reversed* December 16, 1975

1. It is respectfully submitted that any question respecting the timeliness of this motion should be considered in light of the December 16, 1975 decision date of the Court of Appeals for the Eighth Circuit in *Hardison* v. *Trans World Airlines, Inc., et al.*, ... F.2d ....., *reversing* 375 F. Supp. 877 (W.D. Mo. 1974).

by the Court of Appeals for the Eighth Circuit.[2] The Eighth Circuit's decision in *Hardison* and the Sixth Circuit's opinion in *Parker Seal* are in direct conflict with the August 20, 1975 opinion of the Sixth Circuit in *Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975).[3] TWA intends promptly to file in this Court a petition for a writ of certiorari for review of the December 16, 1975 decision of the Court of Appeals for the Eighth Circuit in *Hardison* v. *Trans World Airlines, Inc., et al.*

The exceptionally important questions posed by *Parker Seal* in its petition for a writ of certiorari as to what an employer must do to accommodate, without undue hardship, an employee's religious practices in order to satisfy the requirements of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq. (Supp. II, 1972)) and the regulations thereunder; whether a construction of the foregoing statute requiring an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs violates the establishment clause of the First Amendment and whether this Court will exercise its supervisory powers to resolve important and direct conflicts in opinions by different courts of appeal are matters of significant national concern. However,

2. The district court judgment in favor of certain defendant unions, International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142 and International Association of Machinists and Aerospace Workers, Local 1650, was upheld by the court of appeals because of Hardison's failure to effectively process an appeal against them.

3. A copy of the *Reid* opinion appears as Appendix G, page 63a to Parker Seal's petition. TWA respectfully submits that the decisions of the courts of appeal in *Parker Seal* and *Hardison* are also in direct conflict with the decision of the court of appeals for the Fifth Circuit in *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). See also *Roberts* v. *Hermitage Cotton Mills*, 8 FEP 315 (D.C. S.C. 1974), *aff'd* 8 FEP 319 (4th Cir. 1974).

Parker Seal does not include in its factual background a collective bargaining agreement containing non-discriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have.

Consequently, the Eighth Circuit's decision in *Hardison* gives rise to additional important questions involving whether an employer can be required under the Civil Rights Act and the establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a collective bargaining agreement that, by stipulation and court finding, was completely non-discriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement. These questions ought to be resolved in the interest of uniform administration of significant legislation and the determination of constitutional questions of substantial import.[4]

TWA makes this motion for leave to file an *amicus curiae* brief to bring to the Court's attention the recently occurring conflict between decisions of the Sixth and Eighth Circuits involving accommodation of religious practices under Title VII of the Civil Rights Act of 1964 and additional important questions involving the relationship between that Act and religiously non-discriminatory provisions of collective bargaining agreements made pursuant to such statutes as the Railway Labor Act (45 U.S.C.

4. For a law review note on recent developments questioning the majority opinion and supporting Judge Celebrezze's dissent in *Parker Seal*, see 44 Fordham Law Review 442 (1975).

§§151 et seq.) and the National Labor Relations Act (29 U.S.C. §§151 et seq.)

Respectfully submitted,

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BRIEF OF TRANS WORLD AIRLINES, INC. AS AMICUS CURIAE IN SUPPORT OF PARKER SEAL COMPANY'S PETITION FOR A WRIT OF CERTIORARI

Trans World Airlines, Inc. (hereinafter referred to as "TWA"), as *amicus curiae*, joins the Parker Seal Company, the petitioner (hereinafter referred to as "Parker Seal"), in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered herein on May 23, 1975.

I. OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D, page 13a) is reported at 516 F.2d 544. The opinion of the district court (Pet. App. B, p. 72) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. App. A, p. 1a) is unreported.

II. JURISDICTION

The judgment of the court of appeals was entered May 23, 1975. A timely petition for rehearing was denied by order entered July 18, 1975 (Pet. App. F, p. 61a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

The following questions have been succinctly stated by Parker Seal:

1. Whether the court of appeals has improperly determined that an employer which tries, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

2. Whether, as construed and applied by the court of appeals, the foregoing statute and guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the establishment clause of the First Amendment.

3. Whether irreconcilable conflicts between varying panels of the court below under the statute and guideline here at issue call for the exercise of this Court's supervisory jurisdiction.

TWA respectfully submits that because of the widespread presence in industry throughout the nation of collective bargaining agreements containing seniority and other uniform work rules provisions, additional important questions inhere in such cases regarding what an employer and unions must do in their effort to reasonably accom-

modate the deviate religious practices of certain employees. One such additional question is whether an employer can be required under the Civil Rights Act and establishment clause of the First Amendment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that is completely nondiscriminatory against any religion; or (b) financing an employee's religious observances through payment of premium or overtime wages to a replacement?

IV. CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (Supp. II, 1972).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> "It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions

or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).

Section 703(h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h)

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

> "[S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> "[T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1974).

V. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before state and federal administrative agencies and the lower federal courts. The facts underlying petitioner's claim as well as a descriptive

history of the prior investigation and litigation are fully and amply set forth in the brief of Parker Seal. Significantly, the trier of facts in *Parker Seal* (both the Kentucky Commission on Human Rights and the district court) found in favor of Parker Seal.[1] *Parker Seal* does not, however, include in its factual background a collective bargaining agreement containing nondiscriminatory seniority clauses and other provisions establishing uniform work rules of the kind TWA and many other employers have entered into with unions.

VI. REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises Significant and Recurring Problems Concerning the Requirements of an Employer to Accommodate Without Undue Hardship His Employee's Religious Practices, Especially in View of the December 16, 1975 Decision of the Court of Appeals for the Eighth Circuit in Hardison v. Trans World Airlines, Inc., et al.

Parker Seal presents this Court with the case of an employer who, once having accommodated an employee, was thereafter foreclosed from asserting that its accommodation efforts caused it undue hardship. The result of having all but written the "reasonable accommodation" rule out of the applicable law is that substantial on-going problems of nationwide impact in the administration of important federal statutory schemes such as the Railway

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1. The propriety of a court of appeals substituting its views of the facts for those of the trier of facts in derogation of Rule 52(a) of the Federal Rules of Civil Procedure is a practice that ought [redacted] be indulged only when reasonable men could not differ. The Eighth Circuit in *Hardison* did not accept the findings of fact by the district court but substituted its own findings on the critical factual issues of the case. *Cf. Yott v. North American Rockwell Corporation*, 501 F.2d 398 (9th Cir. 1974).

Labor Act (45 U.S.C. 151, et seq.) and National Labor Relations Act (29 U.S.C. 151, et seq.) have been created. Those problems have recently surfaced in the December 16, 1975 decision of the United States Court of Appeals for the Eighth Circuit in *Hardison* v. *Trans World Airlines, Inc., et al.*, 375 F. Supp. 877 (W.D. Mo. 1974), *rev'd*, ... F.2d ..... (8th Cir. 1975).

Briefly, TWA was able to initially accommodate Hardison's Friday sundown to Saturday sundown Sabbath requirement; however, Hardison thereafter transferred, to suit his own convenience, to a new shift where he knew he did not have sufficient seniority to avoid Saturday work. TWA continued its efforts to accommodate Hardison's religious practices but could not do so within the framework of the collective bargaining agreement. Hardison was the only person performing his essential job on the new shift and his seniority position would have required him to work on Saturdays. After Hardison was absent for several successive Saturdays and left early on a Friday shift, a discharge hearing was held under the collective bargaining agreement and Hardison was discharged. Hardison did not thereafter cooperate with his local union in its efforts to pursue grievance procedures in respect to his discharge.

After having the matter under advisement for 53 weeks, the Eighth Circuit reversed the district court. Preferential treatment was directed to be given Hardison solely on the basis of his religion even though such treatment would require TWA to pay overtime wages to other employees and cause other employees to give up their seniority rights.

The holdings in *Parker Seal* and *Hardison* result in it being well-nigh impossible for an employer with a large labor force to demonstrate any "undue hardship" in reasonably accommodating religious practices of its employees. The need to resolve the problems created by decisions in such cases as *Parker Seal* and *Hardison* is heightened by the innumerable and inevitable conflicts thrust upon the thousands of employers and unions across the country that are governed in their relations by collective bargaining agreements, which, in the language of 42 U.S.C. § 2000e-2(h), ". . . are not the result of an intention to discriminate because of . . . religion. . . ."

B. This Court Should Exercise Its Supervisory Power to Resolve the Conflicts Which Cannot Be Harmonized Among the Circuit Courts of Appeal.

The *Parker Seal* and *Hardison* decisions are in direct conflict with *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). That conflict also encompasses an internal conflict within the Sixth Circuit. TWA believes that the courts of appeal decisions in *Parker Seal* and *Hardison* are also in direct conflict with the decisions of the courts of appeal for the Fourth and Fifth Circuits; see *Roberts* v. *Hermitage Cotton Mills*, 8 FEP 315 (D.C. S.C. 1974), *aff'd*, 8 FEP 319 (4th Cir. 1974) and *Johnson* v. *United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). See also *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971).

TWA respectfully submits that such conflicts should be resolved by this Court before they spawn judicial error and needless litigation for years to come in regard to important statutory and constitutional questions.[2]

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2. The opinion by the district court (Oliver, J.) in *Hardison* has been cited with approval and followed in *Dixon* v. *Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974); *United States* v. *City of Albuquerque, et al.*, 9 EPD 10,182 (D. N. Mex. 1975); *Young* v. *Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975) and *Cook* v. *Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975).

C. The Statute and Guideline Violate the Establishment Clause of the First Amendment.

The importance and substantial character of the statutory and constitutional issues presented by *Parker Seal* are recognized in the cases and law review articles dealing with the religious discrimination aspects of Title VII of the Civil Rights Act. Commencing with *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971) "grave constitutional questions" were raised regarding violation of the establishment clause of the First Amendment. Distinguished legal scholars have asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented by *Parker Seal* and *Hardison* would constitute a violation of the establishment clause of the First Amendment. See Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971).

The importance of the constitutional questions presented is set forth by Judge Celebrezze's dissent in *Parker Seal*. Significantly, a current law review note on recent developments in 44 Fordham Law Review 442 (1975) questions the approach of *Parker Seal's* two-judge majority and supports the rationale of Judge Celebrezze's dissent.

The Eighth Circuit in *Hardison* commenced its decision by stating that the appeal presented "important questions". The court of appeals also admitted that TWA's position that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner that results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is "not without articulate support".[3]

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3. See also the dissent of Judge Lumbard in *Reid* v. *Memphis Publishing Co., supra*, page 524 n.1.

VII. CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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